

<sup>1</sup> Based on the agreement of the parties, the ALJ ordered the consolidation of these two claims into Docket No. 1.051.002. R.H. Trans. at 4-5.

**ISSUES**

Respondent claims the ALJ erred in determining the nature and extent of claimant's disability. Specifically, respondent contends claimant did not prove she suffered any permanent impairment of function as a result of the December 30, 2009 accident and that the ALJ inaccurately calculated claimant's percentage of task loss. Respondent maintains the ALJ's finding that claimant's injury did not directly cause a psychological injury and did not aggravate her psychological conditions should be affirmed. Respondent also argues that it should not be assessed the costs associated with the court-ordered IME because: (1) claimant had previously been determined to be at maximum medical improvement (MMI); and, (2) Dr. Reed violated the ALJ's order by acting as an advocate for the claimant during the evaluation process.

Claimant contends the Award should be modified to find that she suffered a psychiatric injury as well as a physical injury. Claimant also requests that the Award be modified to award claimant permanent disability benefits based on a finding of permanent total disability. Claimant contends respondent's position that it should be relieved from liability to pay the costs of the court-ordered IME is without merit and should be summarily rejected.

The issues for the Board's review are:

- (1) To what extent, if any, did claimant prove she suffered a permanent functional impairment and work disability as a result of the work-related accidental injury?
- (2) Did claimant suffer psychiatric injury as well as physical injury?
- (3) Is claimant permanently totally disabled?
- (4) Should respondent be relieved of the responsibility for the costs associated with the court-ordered IME of Dr. Reed?

**FINDINGS OF FACT**

Claimant is approximately age 37 and worked for respondent as an office coordinator. Her job required her to lift file boxes and at times move furniture. On December 30, 2009, while preparing to change offices, claimant was trying to move a cabinet which weighed approximately 50 lbs. As she attempted to lift the cabinet, she felt a sharp pain in her lower back that persisted thereafter. That evening claimant experienced pain in her legs.

The following day claimant was seen by her personal care physician, Dr. Jeffrey Atwood. She complained of low back pain with radiating pain down her left leg. Dr. Atwood referred claimant to physical therapy and ordered a lumbar MRI scan. The MRI, which was performed on January 6, 2010, revealed degenerative disk disease, particularly

at L1-2 and L4-5, as well as a small disk protrusion at L5-S1, with no evidence of nerve root displacement or central canal stenosis. Following the MRI, Dr. Atwood recommended epidural steroid injections. Claimant testified that about a week or so after the accident, her pain radiated primarily into her right leg, although she continued at times to have pain in the left leg.

Claimant had several preexisting medical and psychological conditions. She testified on direct examination at the preliminary hearing that she had no previous back or radiating pain, but she admitted she told Dr. Blanchard in 2000 that she had low back pain as a result of some automobile accidents. On December 31, 2009, she told Dr. Atwood that she had a history of low back pain. However, she testified that before the accident she had not experienced pain in the same area of her low back.

Claimant was previously diagnosed with depression and anxiety as well as hypothyroidism. Eight days before her accident, claimant was seen in Dr. Atwood's office complaining of joint pain and body aches that were bad enough to require prescription medication. Claimant said she started having problems with generalized pain in her shoulders, arms, wrists, elbows and upper chest in August 2009. Claimant was diagnosed with fibromyalgia shortly before the accident. Claimant also suffered from obesity and after her accident she underwent gastric bypass surgery.<sup>2</sup>

Dr. C. Reiff Brown, a retired board certified orthopedic surgeon, examined claimant on July 7, 2010, at the request of claimant's attorney. Claimant told Dr. Brown that as she lifted a cabinet on December 30, 2009, she had a feeling of tightness in her back but no pain until that evening when she developed pain in her low back. By the next morning, the pain was radiating into the back of her left leg and to a lesser degree into her right leg. Claimant told Dr. Brown she then noticed a shift of her pain from the left leg to the right. She complained to Dr. Brown of back pain, leg pain, and intermittent numbness.

After performing a physical examination, Dr. Brown opined that claimant had suffered an aggravation of degenerative disk disease in her lower lumbar segments as a consequence of the December 30, 2009, accident.

Using the AMA *Guides*<sup>3</sup>, Dr. Brown placed claimant in DRE Lumbosacral Category III which allows a 10% whole body impairment rating. Dr. Brown attributed claimant's impairment to her injury on December 30, 2009. He did not attribute any impairment to a preexisting condition. Claimant denied to Dr. Brown that she ever had lumbosacral discomfort before the injury at issue in this claim. Dr. Brown acknowledged that if medical

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<sup>2</sup> Claimant underwent gastric bypass surgery on February 25, 2011, 9 days after her last day of work at respondent.

<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

records contained evidence of prior low back pain, that would materially change his testimony.

Dr. Brown said he did not consider claimant's fibromyalgia in rating claimant's impairment because that condition was entirely different than claimant's now symptomatic degenerative disk disease. Dr. Brown testified claimant's fibromyalgia would not have the same symptoms because the pain of degenerative disk disease is typically localized in the affected joints, whereas with fibromyalgia painful areas are not usually associated with joints but rather areas of muscle mass.

Dr. Brown recommended claimant be referred for treatment by an orthopedic surgeon. He also placed restrictions on claimant that she avoid lifting over 10-15 pounds, avoid frequent bending and rotation of the lumbar spine greater than 30 degrees, and avoid frequent long walks, long sitting and stair climbing. Dr. Brown reviewed the task list prepared by Robert Barnett, Ph.D. Of the 29 tasks on the list, he opined that claimant was unable to perform 16 for a 55% task loss.

Dr. Chris Fevurly is board certified in internal and preventative medicine as well as an independent medical examiner. He examined claimant on July 13, 2010, at the request of respondent. After reviewing claimant's medical records, taking a history and performing a physical examination, Dr. Fevurly diagnosed an acute temporary sprain/strain of the lumbar spine and an acute temporary exacerbation of chronic preexisting pain complaints. By acute, he meant there was an immediate, or a short duration, from onset of the reported pain and the event described. Dr. Fevurly found no evidence that claimant had neurogenic compromise or neurological deficit. He found no evidence of vertebral segmental instability, sciatica, or nerve root entrapment or injury.

Dr. Fevurly's diagnostic impressions were based on his finding that claimant had similar if not the same type of complaints before the December 30, 2009 event and because the injury was most likely a soft tissue sprain or strain, which would have an expected disability duration of about two months.

Dr. Fevurly did not place any restrictions on claimant and he did not find that claimant had any permanent impairment based on the *AMA Guides*. He said claimant would be limited to a medium work level, which had nothing to do with her work event of December 30, 2009, but was related to her preexisting pain complaints and the fact that she is deconditioned. On cross-examination, Dr. Fevurly admitted that claimant would not be able to perform any task that involved lifting over 50 pounds, frequent lifting over 20 pounds, or more than occasional bending. He noted that claimant had previously been diagnosed with Lyme's Disease and fibromyalgia. She has chronic bilateral knee pain and has had five surgeries to her knees. She has generalized mid to lower back pain, which was associated to Lyme's Disease in 2006. Dr. Fevurly reviewed the task list prepared by Dr. Barnett and was of the opinion that claimant had lost none of her ability to perform work tasks as a result of her work event of December 30, 2009.

Dr. Fevurly did not believe claimant should have any therapeutic interventions, as anything that could be offered would be too dangerous and unlikely to benefit her. He said claimant should be encouraged to increase her activity level and avoid potentially harmful drugs such as long acting opiates.

Dr. William Reed, Jr., an orthopedist, examined claimant on September 20, 2010, at the request of the ALJ for a neutral medical evaluation. Claimant told Dr. Reed that as she was lifting a cabinet, she felt a slight strain in her low back but no significant pain. However, later that night, pain started to develop in her left leg. She was treated with physical therapy, steroid injections, and Lortab. Her left leg pain resolved but she began having right leg pain that extended into her foot. She had numbness and tingling in the right foot. Dr. Reed watched for signs of depression during his examination, but he did not observe any.

After reviewing claimant's medical records, including x-ray and MRI reports, and performing a physical examination, Dr. Reed diagnosed lumbar degenerative disk disease and diminished intervertebral disk height without spinal instability. Dr. Reed opined that claimant had preexisting degenerative disk disease that was aggravated by her injury. Because of claimant's persistent pain, Dr. Reed recommended a myelogram and a CT scan.

Dr. Reed issued a second report to the ALJ on November 29, 2010. He stated that claimant's CT scan and myelogram had an absence of profound abnormalities, although he noted that claimant had significant bulging at L1-2. Dr. Reed recommended claimant undergo discography and provocative saline acceptance test to determine whether discogenic pain was present. Claimant returned to see Dr. Reed on January 18, 2011, after the discography. Dr. Reed's note of that date indicates the discography documented she had discogenic pain and abnormalities from L1 to the sacrum. Dr. Reed opined that she would not benefit from surgery. He recommended weight reduction and a functional capacity evaluation. He placed claimant on sedentary duty with a 10-pound lifting restriction on an occasional basis.

Dr. Reed did not believe claimant would benefit from pain management. He stated claimant's primary medical need in the future would be management of her preexisting fibromyalgia, and anything that is done for her fibromyalgia would concomitantly benefit any chronic pain she may experience from her back condition. The treatment for either condition is similar.

Dr. Terrence Pratt is board certified in physical medicine and rehabilitation and is a certified independent medical examiner. He examined claimant on March 31, 2011, at the request of claimant's attorney. Claimant provided Dr. Pratt with a history of her injury of December 30, 2009. He reviewed her medical records and the transcript of the deposition of Dr. Reed. Dr. Pratt performed a physical examination.

Dr. Pratt did not have any of claimant's pre-accident medical records. He noted in his history that claimant had a history of chronic back pain, but not chronic low back pain. Claimant told Dr. Pratt that she had chronic pain before the accident in the areas of her joints, ear/jaw and upper body.

In his examination Dr. Pratt found no evidence of vertebral body compression; posterior element, transverse process or other spinal fracture; spondylolisthesis; or vertebral body dislocation. She had no verifiable radiculopathy. She had no loss of relevant reflexes, no significant atrophy, and no loss of motion segment integrity. She had an indication of impairment related to an injury but without significant evidence of radiculopathy. Dr. Pratt found claimant had residual discomfort in the lumbar paraspinal muscles and discomfort upon palpation of the low back. Claimant also showed diminished lumbar range of motion. Dr. Pratt noted claimant's CT scan-myelogram revealed discogenic changes, although he could not attribute the changes solely to this accident.

Dr. Pratt's diagnosis was chronic low back pain with a history of degenerative disk disease. Dr. Pratt found that claimant's aggravation of her degenerative disk disease was related to the December 2009 event. He recommended claimant's discogram be reviewed by a surgical specialist. He also recommended consideration of pain management with fluoroscopic guided injections and a comprehensive pain management assessment.

Based on the *AMA Guides*, Dr. Pratt rated claimant as having a 5% permanent partial impairment to the whole body. Dr. Pratt placed claimant in DRE Lumbosacral Category II with no significant or verifiable radicular symptoms. None of his 5% rating relates to any of claimant's issues with fibromyalgia.

Dr. Pratt recommended claimant have permanent restrictions to avoid frequent bending or twisting of the lumbosacral region, avoid lifting in excess of 30 pounds occasionally and 15 to 20 pounds frequently, and avoid pushing or pulling in excess of 60 pounds. Dr. Pratt reviewed a list of 29 work tasks compiled by Dr. Robert Barnett which claimant performed in the 15-year period prior to the December 30, 2009 accidental injury. Dr. Pratt opined that claimant was unable to perform 15 of the tasks for a 62.5% task loss. However, from a review of Dr. Pratt's testimony and the list of work tasks attached to his deposition, it appears he failed to count the last page of tasks, which would add five more tasks, all marked no. Hence, the correct calculation of claimant's percentage of task loss per Dr. Pratt appears to be that claimant could not perform 20 of 29 tasks for a 69% task loss.

Dr. Daniel Zimmerman, an internist and a certified independent medical examiner, examined claimant on June 23, 2011, at the request of claimant's attorney. He reviewed claimant's medical records since the accident and took a history. Claimant told Dr. Zimmerman that she was lifting a cabinet when she felt a slight pain in her low back. As time passed the lumbar pain intensified. She then developed pain and discomfort affecting her left lower extremity. An MRI obtained January 6, 2010, showed minimal annular bulging at L1-2, a small annular tear at L4-5, and a small central disk protrusion at L5-S1.

Dr. Zimmerman took a lumbar spine x-ray in his office. The x-ray showed claimant had normal vertebral alignment with osteoarthritic changes at T12-L1 and L1-2.

Dr. Zimmerman performed a physical examination and diagnosed a permanent aggravation of lumbar disk disease at L4-5 and L5-S1. He opined claimant was at maximum medical improvement. Based on the *AMA Guides*, using the range of motion model, Dr. Zimmerman found claimant's impairment of function was 19% to the whole body. Dr. Zimmerman acknowledged that various factors could impact a person's range of motion.

Dr. Zimmerman did not check for fibromyalgia trigger points relevant to the diagnosis of fibromyalgia, which played no part in his impairment rating.

Dr. Zimmerman believed claimant was capable of lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis. Claimant should avoid frequent flexing of the lumbosacral spine and avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities. Dr. Zimmerman reviewed a list of work tasks prepared by Dr. Barnett. Of the 29 tasks on the list, Dr. Zimmerman opined that claimant is unable to perform 15 for a 52% task loss.<sup>4</sup>

Dr. Zimmerman knew claimant had returned to work and that she worked until February 16, 2011. He did not know what type of work she performed after returning to work. Dr. Zimmerman believes claimant is able to work as long as it is within his restrictions.

Dr. Robert Barnett, is a licensed clinical psychologist as well as a rehabilitation counselor and evaluator. Dr. Barnett performed a psychological evaluation on February 18, 2011, at the request of claimant's counsel. Later, on April 8, 2011, he had a telephone interview with claimant in which he performed a wage and task assessment.

In Dr. Barnett's psychological evaluation he found claimant presented as friendly but anxious. Dr. Barnett described her affect during the interview as dysphoric, a clinical term for sad. During the interview claimant was occasionally tearful. Her thought processes were logical and coherent. There were no hallucinations, delusions, or loss of contact with reality.

Claimant underwent psychological testing. She was found to be in the low to average range of intelligence. The results of the Brief Symptom Inventory indicated elevations in the obsessive compulsive, depression, anxiety, and paranoid ideation scales. Dr. Barnett testified that people who are particularly worried have elevated obsessive compulsive scales. Dr. Barnett would classify claimant as having excessive worry, not

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<sup>4</sup> Concerning task No. 18, Dr. Zimmerman testified if the lifting requirement shows 10 pounds rather than 50 pounds, claimant would be able to perform that task, which would change his task loss opinion from 52% to 48%.

obsessive compulsive disorder. The elevation of the depression and anxiety scales were consistent with his observations in the interview. Dr. Barnett did not think claimant was paranoid, but just had low trust levels. Claimant reported having trouble falling asleep, which Dr. Barnett found consistent with excessive worry. Claimant experienced feelings of guilt because she perceived she was not doing her part to support the household by working or doing household chores. Testing indicated she is a guarded individual, unwilling to acknowledge psychological problems.

Dr. Barnett opined claimant had adequate reading skills to pursue further education or training and to participate in many types of employment. Claimant had no specific difficulties with attention or concentration. In the interview, she claimed to have memory problems, but Dr. Barnett observed nothing to support memory loss. Claimant had no difficulty with attention and concentration.

Claimant experienced difficulties during her adolescence and she was in state custody for a period and was evaluated psychiatrically. Claimant told Dr. Barnett her mother would call her therapist and lie about conversations and things that occurred in their relationship. Claimant was hospitalized at a psychiatric hospital at age 25 due to heightened anxiety, which she attributed to thyroid dysfunction. She said when the thyroid issue was addressed, the anxiety resolved. She had not seen a mental health professional since then.

Claimant described her symptoms of depression as sadness, easily tearful, trouble sleeping, no appetite (but eats anyway), heartburn, diarrhea, constipation, difficulty enjoying activities, and no libido. She described her symptoms of anxiety as agitation, edgy, shortness of breath, pounding heart, nausea with vomiting, and frequent headaches. She had been taking Xanax on an as needed basis when she anticipated stressful events.

Dr. Barnett's opined claimant's condition had gone beyond adjustment disorder. Claimant's condition has a chronicity to it that makes him think she has dysthymic disorder. Dysthymic disorder is triggered by an event. Dr. Barnett believes the event that triggered claimant's dysthymic disorder is her injury, loss of function, and loss of job. Dr. Barnett was unaware that claimant's last day at work was only two days before his psychological evaluation. He admitted that information could change his opinion as to loss of job being a causative factor in claimant's adjustment disorder.

Dr. Barnett testified claimant was receiving psychiatric medications from her family physician, but he felt there was room for improvement in her medication, especially if she saw a qualified psychiatrist. Although her test results indicated she would not be a good candidate for psychotherapy, Dr. Barnett believed nothing would be lost by making the attempt, and he recommended she see a licensed psychologist rather than a counselor or social worker. Dr. Barnett was advised by claimant's counsel that claimant did not desire to seek any change in her medication or seek the counseling he recommended. That being so, Dr. Barnett testified claimant was doing as well as she is ever going to do without increased or more focused treatment. His concern was that claimant had emerging anxiety

and panic episodes and the general course of this problem without treatment is that it gets worse and may deteriorate into more severe anxiety or even agoraphobia.

Based on the *AMA Guides*, second and fourth editions, Dr. Barnett rated claimant as being in class 3 with a percentage of psychological impairment of 40% to the whole body.

Dr. Barnett asked claimant why she felt she was unable to work, and she answered it was because of chronic pain in her back and legs, memory problems, anxiety and depression. Dr. Barnett believed that claimant's decision not to work was based on her belief she is unable to work and contribute to her family. If claimant had returned to work, and she was able to maintain employment, her depression and anxiety would be reduced, but he did not think it would go away entirely.

Dr. Barnett opined that given claimant's physical restrictions, combined with her psychological symptoms, she was essentially unemployable. With regard to her psychological status, claimant would work best if she could work alone and avoid interaction with others. If claimant's psychological condition caused her only limitation, Dr. Barnett's opinion was that claimant had the ability to work in substantial gainful employment. But combined with the physical limitations, he testified she could not.

Dr. Barnett's causation opinion is based upon a history of claimant having no symptoms of dysthymic disorder, depression, or anxiety prior to the date of the accident. If there were such prior symptoms claimant did not report, it would be Dr. Barnett's opinion that they were aggravated by the injury. In his opinion, a person who experiences increasing symptomology following an injury has an aggravation or the onset of new symptoms. However, claimant did not describe that to him. Claimant did not tell Dr. Barnett she had fibromyalgia. She did not tell Dr. Barnett she had chronic pain before her accident.

As a result of his telephone conference with claimant on April 8, 2011, Dr. Barnett prepared a list that included 29 work tasks claimant performed in the 15-year period before her accident. Dr. Barnett acknowledged he had no contact with respondent in regard to claimant's task list. He did not know claimant was employed after her accident at respondent.

Patrick Caffrey, Ph.D., evaluated claimant at respondent's request. He is a psychologist in private practice and is in the process of becoming board certified in neuropsychology. He is also a vocational specialist. His Ph.D. is in vocational education for the handicapped. The information in Dr. Caffrey's report about claimant's past medical and psychiatric history came from claimant, as did the information contained in his report under the headings of education and vocational history, social history, and current treatment category.

Claimant displayed adequate levels of effort for purposes of the intellectual capacity testing, showing that she was credible and was exerting adequate effort. The testing revealed a valid profile, indicating she was not exaggerating her claims of disability. On the Beck Depression Inventory II, claimant posted a total score of 33, which is a high score consistent with severe depression. Her Beck Anxiety Inventory score of 16 is in the moderate range for intensive anxiety, suggesting claimant has at least moderate anxiety. The testing results indicated claimant had somatic complaints as well as emotional and behavioral dysfunction.

Dr. Caffrey diagnosed somatization disorder, in which a person has a tendency to convert stress into bodily symptoms and other problems. He also diagnosed panic disorder, agoraphobia, and major depressive disorder without psychotic features. She had a history of an eating disorder. Dr. Caffrey opined that claimant meets the diagnostic criteria for borderline personality disorder with obsessive compulsive features. She had acute stress related to her marital crises, limited social support, and ongoing stress related to interacting with the medical community and workers compensation system. Dr. Caffrey assigned claimant a value of 60 for her current global assessment of functioning (GAF), which would indicate at least mild functional problems.

Dr. Caffrey, however, testified that he did not believe claimant had depression, anxiety disorder, or dysthymic disorder that was caused by, aggravated by, or accelerated by her claimed work injury of December 30, 2009. He believes claimant retains the ability to work. Dr. Caffrey opined that claimant does not qualify for impairment under the AMA *Guides* for any psychological condition she alleges is connected with her accident. It is Dr. Caffrey's opinion that these conditions existed before her work injury. He does not believe the conditions were aggravated or accelerated by the work injury. He testified that claimant had depression before her work-related injury. His report shows claimant had a long history of psychiatric and psychological problems going back to the time she was a teenager.

Although Dr. Caffrey does not believe that claimant has any impairment as a result of her accident, he does believe she has a psychological impairment. He did not provide a specific rating.

Dr. Caffrey agreed that in claimant's mind, she is unable to work. Claimant's GAF score of 60 indicates moderate difficulties with occupational functioning. He testified the stress claimant suffers from her psychiatric condition could enhance or increase her pain symptoms. Depression can cause people to experience pain in a more acute way. Pain can intensify or accelerate depression. Not working and not doing all of the things she previously enjoyed might intensify her preexisting depression.

Audrey Schremmer-Philip, respondent's executive director, is familiar with the job duties of respondent's employees. Claimant was classified as an office coordinator. The essential job duties of an office coordinator were to provide and oversee the clerical and administrative functions for the office. She was responsible for seeing that the phones

were answered; mail processed; communications routed to the correct staff; ordering supplies; and making sure issues at the facility were taken care of, such as calling for an electrician or plumber. Claimant also helped with the agency's newsletters and the preparation of office forms. To a degree, she served as Ms. Schremmer-Philip's assistant.

Ms. Schremmer-Philip reviewed the task list prepared by Dr. Barnett. She agreed that claimant performed the tasks listed on the list, although she had disagreements with some of the weights claimant claimed to have lifted and the length of time claimant performed some of the tasks. She denied that claimant would have been required to move furniture. Ms. Schremmer-Philip was not aware that claimant had moved any furniture at work other than setting up tables.

Ms. Schremmer-Philip testified claimant said she had to stop working at respondent because she would be unable to perform her work in the required time or work her regular hours. Ms. Schremmer-Philip said claimant is still listed as an employee of respondent, although she received no wages and her fringe benefits have been terminated. In order for claimant to return to her job, she would have to review the job description and state that she believed she could fulfill the essential duties of the position and work on a regular, consistent basis.

#### PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>5</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>6</sup>

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not

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<sup>5</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>6</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Psychological disorders can be compensable if they are directly traceable to a claimant's physical injury.<sup>7</sup>

### ANALYSIS

The Board finds that the Award should be modified to find that claimant's task loss is 58.67%, resulting in a work disability of 79.34%. The Award is affirmed in all other respects.

The preponderance of the credible evidence supports the ALJ's conclusion that as a result of claimant's physical injury to the lumbar spine, she sustained a 5% permanent partial impairment of function to the whole person. The Board agrees with the ALJ that the functional impairment opinion of Dr. Pratt is the most credible.

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<sup>7</sup> *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994); *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl. ¶ 1, 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

It is undisputed that claimant's wage loss was 100%. The court appointed physician, Dr. Reed, did not express opinions with respect to task loss or impairment of function. The Board is persuaded that equal weight should be given to the task loss opinions expressed by Drs. Brown (55%), Pratt (69%) and Zimmerman (52%), resulting in a task loss of 58.67%. The opinions of Dr. Fevurly are not credible because they are substantially at variance with the other expert medical testimony set forth in the record. Dr. Fevurly found no permanent impairment, whereas Drs. Brown, Pratt and Zimmerman all found loss of physical function ranging from 5% to 19%. Only Dr. Fevurly found that claimant should not be subject to permanent restrictions. The other four testifying physicians all imposed permanent restrictions. Dr. Fevurly's finding of no task loss stands in striking contrast to the opinions of Drs. Brown, Pratt and Zimmerman.

Likewise, only Dr. Fevurly did not diagnose an injury to the lumbar spine resulting in a permanent aggravation of claimant's preexisting lumbar degenerative disk disease.

The ALJ's findings regarding whether claimant sustained her burden of proof that she sustained psychological injury directly traceable to her physical injury, and whether claimant sustained permanent total disability, are fully supported by a preponderance of the credible evidence and are adopted by the Board. The ALJ's findings on these issues are set forth in detail in the Award and need not be replicated here.

Respondent does not contend that the ALJ lacked authority under K.S.A. 44-516 to appoint Dr. Reed, as a neutral examining physician. Nor does respondent contest the provision in the Preliminary Hearing Order dated August 25, 2010, which ordered that respondent pay the costs of Dr. Reed's exam and report. Rather, respondent advances the position that claimant had already been found by two physicians to have achieved MMI. However, there is nothing in the Act which places any such limits on the ALJ's authority to appoint a neutral medical evaluation and the Board declines to create such a provision.

Respondent also argues that it should be relieved of liability for the costs of Dr. Reed's evaluation because the doctor violated the ALJ's order by "acting as an advocate for the claimant during the evaluation process."<sup>8</sup> There is no evidence in the record to support this assertion and it is therefore rejected.

### **CONCLUSION**

1) As a result of the injury in this claim, claimant sustained a 5% permanent partial impairment of function to the body and a 79.34% work disability, consisting of a 100% wage loss and a 58.67% task loss.

2) Claimant did not sustain her burden of proof that she suffered psychological injury directly traceable to claimant's physical injury.

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<sup>8</sup> Respondent's brief at 21 (filed April 12, 2012).

3) Claimant failed to sustain her burden of proof that she is permanently totally disabled.

4) Respondent is liable to pay the costs associated with the court ordered IME of Dr. Reed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated February 27, 2012, is hereby modified to find a 58.67% task loss, thus entitling claimant to permanent partial disability benefits based on a work disability of 79.34%. The Award is affirmed in all other respects. The change in work disability percentage does not affect the amount of compensation being paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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